

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
BOARD OF ZONING ADJUSTMENT



Appeal No. 14424, of the Tenley and Cleveland Park Emergency Committee and the North Cleveland Park Citizens Association, pursuant to Sections 8102 and 8206 of the Zoning Regulations (11 DCMR 3200.2 and 3105.1, respectively), from the administrative decision of the Zoning Administrator made on December 20, 1985 and February 19, 1986 in issuing building permits numbered B311718, B312556 and B312557 for construction on the site of a building for office, retail and theatre use in a C-3-A District at premises 4000 Wisconsin Avenue, N.W., (Square 1823, Lot 9).

HEARING DATE: May 28, 1986  
DECISION DATE: July 2, 1986

FINDINGS OF FACT:

1. The site is located on the west side of Wisconsin Avenue, N.W., between Upton Street on the north and the present site of the Federal National Mortgage Association (FNMA) on the south. The site is in a C-3-A District, and is known as premises 4000 Wisconsin Avenue, N.W.

2. Appellants, the Tenley and Cleveland Park Emergency Committee and the North Cleveland Park Citizens Association, have appealed the decision of the Zoning Administrator to issue building permits numbered B311718, B312556 and B312577, authorizing construction on the premises 4000 Wisconsin Avenue, N.W.

3. Permit numbered B311718 was issued on December 20, 1985, and authorized Intervenor-Appellee, 4000 Wisconsin Avenue Associates (4000 Associates) to perform excavation and sheeting and shoring.

4. Permit numbered B312556 was issued to 4000 Associates on February 17, 1986, and authorized the construction of: (1) a five-story building for office, retail, and theater use; and (2) a 20-foot high retaining wall.

5. Permit numbered B312557 was issued to 4000 Associates on February 19, 1986, and authorized the construction of stairs projecting into public space.

6. The application for the building permit was filed on December 4, 1985, after having been filed for review in the Zoning Division on June 3, 1985.

7. Appellants assert that the issuance of the permits was erroneous on the following grounds:

- (a) As to all permits, that the Zoning Administrator or other responsible officials failed to give ANC 3C the notice required by D.C. Code Sections 1-261(c)(1) and 1-261(c)(3);
- (b) As to all permits, that they are inconsistent with the Land Use Element and other elements of the Comprehensive Plan for the National Capital;
- (c) As to permit numbered B312556, that on the date when it was issued, the construction permits for streets to serve the project stood suspended, with the result that the development could not effectively provide parking spaces required by the Zoning Regulations; and
- (d) Permit numbered B311718 should not have been issued before approval of the entire project.

8. ANC 3C filed a written statement, dated May 21, 1986, of its issues and concerns, identifying them as follows:

- (a) "Comprehensive Plan: violation by the development and lack of implementation."
- (b) "Inadequate notice of the permit applications."
- (c) "Lack of streets and parking ingress/egress."
- (d) "Developer's misrepresentations." and
- (e) "Adverse impact - air quality and traffic - and violation of the purpose of zoning."

The May 21, 1986 statement of ANC 3C incorporated earlier resolutions dated January 27, 1986, February 24, 1986, and March 11, 1986. No resolution of ANC 3C dated January 27, 1986 has been submitted. The ANC also submitted other documents which it did not incorporate in its statement of issues and concerns. The resolution dated March 11, 1986 addresses traffic issues and the proposed construction of portions of Upton Street and the Glover Archbold Parkway. The resolution dated February 24, 1986 sets forth the following concerns:

- (a) The concern, also raised by appellants, about the issuance of the building permit at a time when the street paving permits stood suspended;

- (b) Concern about the massive and undesirable impact of the building on the Wisconsin Avenue corridor, including residential neighborhoods; and
- (c) That the ANC was "purposefully kept in the dark about this project by the developer...."

9. With the sole exception of the issue of access for required parking, neither appellant nor any other party to this appeal contends that the proposed building would violate the Zoning Regulations as they read on the date that the permit was applied for.

10. The Department of Consumer and Regulatory Affairs has not assigned the Zoning Administrator the administrative duty to issue notices to ANCs.

11. On or about December 18, 1985, ANC 3C received a two-page list of building permits applied for and issued between December 2, 1985, and December 6, 1985. Although this list is not a model of clarity, on its face it distinguishes applications for permits from approved building permits in several ways: by designating all applications with the letter "A", followed by a number, and designating all issued permits with the letter "B", followed by a number; by the information set forth in the "remarks" column; and by listing the issued permits first, ahead of all the applications.

12. The distinctions set forth in Finding of Fact No. 11, with respect to issued permits and permit applications, are more than adequate for any person with an interest in proposed construction to become informed about the significance of those distinctions, and to thereby know when an application is pending.

13. In light of the statutory duties of ANCs, as well as the particular interest of ANCs, including ANC 3C, in land use and construction, the Board finds that the notice received on December 18, 1985 provided ANC 3C with actual notice that a permit to construct a new building at 4000 Wisconsin Avenue had been applied for, but not issued.

14. The Board did not admit into evidence Applicant's Exhibit 18G, a notice form which was issued on April 21, 1986, and which reflects revisions in the form. Moreover, the revision of the notice documents which apparently was effected in April, 1986, does not demonstrate that the previous form was inadequate, particularly to the experienced ANC Commissioners to whom it was sent.

15. D.C. Code section 1-261(c)(3) directs the Department of Consumer and Regulatory Affairs to send each ANC a current list of applications for construction and

demolition in the ANC. It does not charge the Department to send a current list of granted applications. The Board therefore is of the view that if an ANC in fact believed, long before December 18, 1985, that it was receiving a list of approvals, but not of applications, it would be reasonable to expect that the ANC would have taken action to correct the situation.

16. If ANC 3C had commented on the permit application before it was approved for compliance with the Zoning Regulations, the ANC "would have offered [the Zoning Administrator] a very detailed traffic study..." and the ANC's "interpretation of how this building is in violation of the Comprehensive Plan."

17. On May 23, 1986, the Acting Director of the Department of Consumer and Regulatory Affairs vacated the suspension of the permits to pave portions of Upton Street and the Glover Archbold Parkway. The permits had been suspended on February 7, 1986, and were reinstated to their full authority on May 23, 1986.

18. On the basis of all of the facts and circumstances surrounding the suspension of the street paving permits, it was reasonable for the Zoning Administrator to determine that the suspension did not require a withholding or recision of the decision that the proposed building would comply with 11 DCMR 2117.4.

#### CONCLUSIONS OF LAW AND OPINION:

##### A. Procedural Matters

After considering arguments of counsel on the motion of the 4000 Wisconsin Avenue Associates to dismiss the appeal for lack of jurisdiction and motions, the Board, through the Chairperson, ruled as follows:

1. The Board does not have jurisdiction to address the issue of inconsistency of the proposed development with the comprehensive plan. Responsibility for comprehensive plan consistency issues is vested in the Zoning Commission. The Board declined appellant's proffer of evidence on this issue, on the ground that the appellants' previous submissions are fully sufficient to identify the appellant's position on this issue, and to enable the Board to determine its lack of jurisdiction.
2. The Board would hear evidence on the issue whether the building permit is invalid because it was issued at a time when the permit to pave the streets was suspended, and arguably there was

therefore no basis for concluding that parking and loading requirements could be satisfied.

3. The Board ruled that it would hear evidence on the issue whether the ANC received notice of the building permit application from the Department of Consumer and Regulatory Affairs. The Board heard this evidence in order to determine whether it has jurisdiction to address the issue, and if it does, to address it.

#### B. The Merits

1. Permits numbered B311718 and B312557 were not issued under the authority of the Zoning Administrator, and the administrative decision whether or not to issue them is not governed by the Zoning Regulations. The Board lacks jurisdiction to address the validity of those permits.
2. The suspension of the street paving permits did not nullify the validity of the Zoning Administrator's decision that the proposed building would comply with 11 DCMR 2117.4, nor cause the issuance of Permit numbered B312556 to violate that provision.
3. The issue of notice to the ANC is not within the Board's jurisdiction.
4. Alternatively, the Zoning Administrator did not approve Permit numbered B312556 in violation of the notice requirements of D.C. Code 1-261(c). ANC 3C received actual notice of the pendency of the application for a building permit. Moreover, the issues and concerns which ANC 3C would have presented to the Zoning Administrator would not have been germane under Title 11, DCMR. The Zoning Administrator could not have disapproved the proposed building on the basis of the ANC's issues and concerns about traffic and the Comprehensive Plan.
5. As to the issues and concerns of ANC 3C in this proceeding, the Board concludes that it has complied with the requirement to give great weight to those issues and concerns throughout this order.
6. Neither the Zoning Administrator nor this Board may disapprove a matter-of-right development on the basis of allegedly excessive traffic impact. The Board has no jurisdiction in this appeal over

traffic issues or concerns which are not within the scope of Title 11, DCMR.

7. The Zoning Commission for the District of Columbia has the statutory duty to insure that the Zoning Regulations are not inconsistent with the Comprehensive Plan. The Land Use Element of the Comprehensive Plan was enacted in March, 1985, ten years after the installation of the elected Mayor and Council of the District of Columbia. Just as it was reasonable for the Executive and Legislative branches to take the time which they determined to be reasonably required to prepare and adopt the Comprehensive Plan, so also is it reasonable for the Zoning Commission to determine a reasonable schedule for the conduct of its business. The Board may not exercise oversight over the Commission in that respect. Further, the Zoning Commission is the only body which may amend the Zoning Regulations, including those provisions which govern matter-of-right developments.

8. Whether or not the developers of 4000 Wisconsin Avenue at any time misrepresented the status of the project is not germane to the issues which are within the jurisdiction of this Board.

Accordingly, it is ORDERED that the appeal is DENIED and the decision of the Zoning Administrator is UPHOLD.

VOTE: 4-0-1 (Maybelle T. Bennett, Charles R. Norris, William F. McIntosh, and Carrie L. Thornhill, to deny and uphold; Paula L. Jewell, not voting, abstaining).

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

ATTESTED BY: \_\_\_\_\_



EDWARD L. CURRY  
Acting Executive Director

FINAL DATE OF ORDER: APR 10 1987

UNDER 11 DCMR 3103.1, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE BEFORE THE BOARD OF ZONING ADJUSTMENT."

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